87-379

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN M. KRUZELOCK,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

DON MOCK
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Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

I

Whether Petitioner who, upon exiting his car in his private drive at 1:00 a.m., is approached by an officer and required to return to his car to answer questions is improperly stopped and has no duty to stop, absent any evidence of either an offense or crime having been committed, being committed or about to be committed, or a reasonable objective grounds for the detention of the person, for purposes of search and seizure analysis under the Fourth and Fourteenth Amendments to the United States Constitution.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The Supreme Court of Illinois denied review of the Illinois Appellate Court, Second District opinion which reversed the trial judge below. The Appellate Court Opinion filed February 10, 1987 and the Illinois Supreme Court denial of review filed June 4, 1987 are in the appendix of this petition.

JURISDICTIONAL STATEMENT

The Judgment sought to be reviewed was dated and entered on February 10, 1987. A Petition for Rehearing was denied. A Petition for Leave to File Appeal to the Illinois Supreme Court was denied June 4, 1987.

The jurisdiction of this Honorable

Court is invoked pursuant to the specific provisions of 28 U.S.C 1257(3).

CONSTITUTIONAL PROVISIONS

Constitution of the United States

Article XIV, Section 1
(Fourteenth Amendment)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV
(Fourth Amendment)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATEMENT OF THE CASE

The trial judge made a finding and entered an order of no probable cause to arrest in an implied consent hearing pursuant to Chapter 95 1.2 Section 11-218(2) on February 4, 1986. The State appealed. Subsequent thereto, the State argued it was collaterally estopped by the trial judge's decision to proceed on charges filed under the "Food and Drug Act" Chapter 56 1/2 section 1402(b) of the Illinois Revised Statutes, it filed a Certificate of Impairment and consolidated the appeals.

The appellate court in an opinion not be published reversed the trial judge. A petition for rehearing was

filed and denied. A petition for leave to file an appeal was denied in the Illinois Supreme Court.

The facts are that petitioner drove into his private driveway at approximately 1:10 a.m. (C.43, L.23 - C.44, L.3). While the officer testified he observed petitioner drive on Addison and Armitage Roads in Addison, Illinois (C.32, L.9-13), the officer neither testified as to any improper driving (C.25-55) nor to any citations issued for improper driving (C.45, L.18-21).

The officer, who had been sitting approximately an hour and twenty minutes in a police car by petitioner's residence, testified initially on direct that the petitioner was out of the car when he first approached (C.33,

L.20); but denied this on cross-examination (C.46, L.20-22). The officer had the petitioner get back into the petitioner's car to take a statement. He stated that he observed the petitioner having difficulty doing so. (C.34, L.14-18). While in the petitioner's car, the officer asked questions. The officer stated that upon asking the questions he was of the opinion that petitioner's speech was slurred (C.34, L.1-5), there was an odor of alcohol on his breath (C.35, L.5-6), and he continued to exhibit signs of bad balance in the car.

The officer told petitioner he had a suspicion that petitioner was under the influence (C.35, L.5-6). He had petitioner perform two field sobriety

tests (C.35, L.9-10). The petitioner walked 10 feet without incident over ice and snow to where he performed a balancing test (C.46, L.23 - C.47, L.24). During the balancing test the officer observed petitioner for approximately 10 to 12 seconds. In his opinion petitioner was not swinging badly, but he drew a conclusion that petitioner had poor balance (C.35, L.13-20).

The officer then required petitioner touch the tip of his nose (C.36, L.5-10). The officer testified that petitioner did not touch the tip of his nose every time (C.36, L.11-13); but on cross-examination he did not recall which finger he tested or the number of times petitioner touched his nose

(C.47, L.18-20). No other tests were performed due to the snowy and icy conditions (C.47, L.12-14 - C.48, L.5,6). The officer then informed petitioner he was under arrest, handcuffed him, and took him to the station house.

At the close of the hearing, the respondent stipulated that the officer approached the vehicle in the driveway. He had no probable cause to arrest him for D.U.I. (C.53, L.18-21). The respondent also stipulated that the question of probable cause did not relate back to an accident earlier that day.

On appeal the appellate court in an unpublished opinion held that the stipulation was not a stipulation that there was no probable cause, but that in context it was only a stipulation that

there was no probable cause at the time of approaching. The court held that the State had the burden of proof; that petitioner had a duty to stop and answer the police officer's questions; and there was probable cause to arrest.

REASONS FOR GRANTING THE WRIT

WHETHER PETITIONER WHO, UPON EXITING HIS CAR IN HIS PRIVATE DRIVE AT 1:00 A.M., IS APPROACHED BY AN OFFICER AND REQUIRED TO RETURN TO HIS CAR TO ANSWER QUESTIONS IS IMPROPERLY STOPPED AND HAS NO DUTY TO STOP ABSENT ANY EVIDENCE OF EITHER AN OFFENSE OR CRIME HAVING BEEN COMMITTED, BEING COMMITTED OR ABOUT TO BE COMMITTED, OR A REASONABLE OBJECTIVE GROUNDS FOR THE DETENTION OF THE PETITIONER, FOR PURPOSES OF SEARCH AND SEIZURE ANALYSIS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

Justice White, in Florida v. Royer, 460 U.S. 491, 498, 75 L.Ed 2d 229, 236 (1983) wrote with respect to police encounters:

> "The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. (citation;). He may not be detained even momentarily without reasonable objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."

As stated by the Court in Brown v. Texas:

> "Even assuming that [a strong social purpose is served to some degree by stopping and demanding identification from an individual without a specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. Brown v. Texas, 443 U.S. 47, 52, 61 L.Ed 2d 357, 99 S.ct. 1637 (1979)."

The Illinois Appellate Court Second District ratio decidendi was that a citizen has a duty to stop and answer an officer's questions, and this street encounter was not a stop because the officer merely engaged in a conversation and there was no restraint place on the petitioner (Opinion pp. 7, 8). However, the facts establish that the

officer approached petitioner in the dark at 1:00 a.m. when the streets are empty and people are generally not walking about. He carries a badge and a gun. The officer informed the petitioner, who had just driven into his own driveway, "who he is" and had him get back into his car to take a report. There is a sufficient show of force to constitute a stop. There is no duty to stop and answer the officer's questions. Florida v. Royer, (1983) 460 U.S. 491, 75 L.Ed2d 229.

When a police officer restrains the freedom of a citizen to walk away, he has seized that person. U.S. v. Brignoni-Ponce (1975) 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed 2d 607; Terry v. Ohio (1968), 392 U.S. 1, 88 S.Ct. 1868,

20 L.Ed 2d 889. When the police officer had the defendant get back into his car he had restrained the freedom of petitioner to walk away. He had seized the petitioner for purposes of due process analysis. Sibron v. New York, 392 U.S. 40, 62, 20 L. Ed 2d 917, 934, 88 S.Ct. 1889; United States v. Doffin, 791 F.2d 118, 120 (8th Circ. 1986).

The Court has held that a stop for investigation must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity. United States v. Cortez (1981), 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed 2d 621. There was no such evidence in this case. The only reasonable inference from the testimony is the petitioner was going into his home.

Nervousness or hesitancy, confusion if you will, is an aspect of the surprise of an unexpected approach of an unknown person in the night. As nervousness has been held not to give rise to a reasonable suspicion in a busy airport, such hesitancy or nervousness on an empty street at night should not give rise to a reasonable suspicion of criminal activity. There is a conflict and uncertainty in the courts below as to the proper rule to be applied in such cases. 45 A.L.R.3d 581, 585.

The officer did not testify to objective, reasonable and articulate grounds for requiring petitioner to stop, answer questions, and get back into his car to answer more questions. There was no testimony that a crime or

offense had been committed or was being investigated, and, therefore, the petitioner had no duty to stop as the court held he did. The officer has no more right to check out the person than he has a right to check out a car and its occupants in People v. James, 44 Ill. App.3d 300, 358 N.E.2d 88 (2nd Dist. 1976); or People v. Lichtenheld, 44 Ill.App.3d 647, 358 N.E.2d 694 (2nd Dist.1976).

The Respondent had the burden and failed to show a consensual search. Florida v. Royer, 460 U.S. at 497, 75 L.Ed 2d at 236. Therefore, an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments occurred and the evidence secured subsequent thereto should be suppressed.

It is respectfully stated that each doctrine of law stems from an underlying principle that has developed through the years. Stare Decisis is one of these principles. The court having entered an opinion which is labeled on its cover "NOT PRECEDENTIAL" is antithetical in fact and theory to the basic principles of law that govern over the Republic.

The concept "precedence" is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." It is the whole nature of the judicial process that each case stand "on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society." Rochin v.

California, (1952) 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed 183. Certainly no one would argue that a "precedential" court decision is a privilege or franchise.

The question of whether movement or gestures, the appearance of confusion or surprise on the unexpected approach of an officer, coupled with the smell of alcohol on a person should or should not give probable cause to arrest for driving under the influence absent any evidence of improper driving is an important question of law. There is a conflict in the courts on whether the odor of Marijuana alone gives rise to probable cause to stop. (5 A.L.R.4th 681). Is the smell of alcohol and the evidence of driving enough to give rise

to an articulate basis for a stop or probable cause for arrest? May the police just stake out the home without a warrant or probable cause and wait for the traveling person to drive up to the home before approaching to determine whether there is possibly probable cause?

If the court answers yes, as the Appellate Court Second District has, the exception then swallows the rule requiring reasonable grounds to make a stop of a person for questioning. Petitioner strenuously argues this is not good law. The Illinois Appellate Court should be reversed.

An important question of Federal law pursuant to the Fourth and the Fourteenth Amendments of the United

States Constitution is presented in which the case law in the courts below is not clear and in conflict. The search of petitioner was not a reasonable one and, therefore, was in violation of the rights protected by the Fourth and Fourteenth Amendments of the U.S. Constitution. The Petitioner respectfully request that a writ of certiorari to the Illinois Appellate Court, Second District be granted in this cause and that the Appellate Court decision be reversed.

Respectfully submitted,

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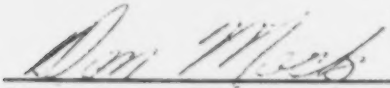

Attorney for Petitioner

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60527 ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
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June 4, 1987

Mr. Don Mock, Jr.
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No. 65027 - People State of Illinois, respondent, v. John M. Kruzelock, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 26, 1987.

No. 2-86-0403 and 86-201 Consolidated

No. 2-86-0403/86/201 Consolidated

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the Circuit Court of DuPage County.
Plaintiff-Appellant,	)	
v.	)	
JOHN M. KRUZELOCK,	)	Honorable Edmund P. Bart John J. Nelligan,
Defendant-Appellee	)	Judges Presiding.

ORDER PURSUANT TO SUPREME COURT RULE 23

This is a consolidated appeal by the State from the trial court's order rescinding the statutory summary suspension of the driving privileges of defendant, John

Kruzelock, and from an order granting defendant's motion to suppress evidence in a related prosecution for unlawful possession of a controlled substance (Ill. Rev. Stat. 1985, ch. 56 1/2, par. 1402(b)). On January 3, 1986, the defendant was arrested and charged by complaint with driving under the influence of alcohol (Ill.Rev. Stat. 1985, ch. 95 1/2, pars. 11-501(a)(1), 11-501(a)(2)). The defendant was also charged with unlawful possession of a controlled substance (Ill.Rev.Stat. 1985, ch. 56 1/2, par. 1402(b)).

On February 4, 1986, the trial court held one hearing which constituted the preliminary hearing on the charge of

unlawful possession of a controlled substance and the hearing on the statutory summary suspension in order to determine whether the arresting officer had reasonable grounds to believe that the defendant was driving or in actual physical control of a motor vehicle while under the influence of alcohol. Officer Scott Sullivan, a police officer for the town of Addison, testified that a person named Mr. Gessel had telephoned the police department and stated that he had been involved in an accident earlier that day. The police officer was dispatched to the scene and then to an address on Armitage Road in Addison where he waited for the other driver involved in the accident to return. Sullivan observed a vehicle approaching and

noted that it belonged to the other driver that was involved in the accident. The Vehicle pulled into the residence where the officer was located. The police officer then gout out of his squad car and approached the driver. Sullivan identified the driver as being the defendant, John Kruzelock.

After advising the defendant that he was there in connection with an investigation of the accident that the defendant was involved in earlier that day. the officer told the defendant who he was and noted that the defendant seemed to be confused. The officer repeated himself three or four times, and then the defendant finally acknowledged the police officer's presence. At that time, the police officer began to speak to the defendant about the accident, According to Sullivan, the

defendant had slurred speech and was hesitant and confused while speaking with Sullivan, The defendant admitted that he had been involved in an accident, but he stated that and the other

driver had agreed not to make a report of it because it was a minor accident. During the conversation with the defendant, Sullivan noticed that the defendant was having continued problems with his speech and had trouble getting back into his car. The defendant exhibited poor balance, and the police officer formed an opinion that the defendant was under the influence of alcohol. Sullivan noted an odor of alcohol on the defendant's breath.

Sullivan then asked the defendant to perform some field sobriety tests. When he asked the defendant to take a balance test by putting his feet together, putting his arms out, and then closing his eyes and tilting his head backwards, it took the defendant approximately 5 or 10 seconds to do so, during that time, the defendant's balance was impaired, although he was not swinging badly. Next, the officer asked the defendant to perform a finger-to-nose test. After requesting the defendant to close his eyes and touch his finger to the tip of his nose, the defendant was able to understand the commands and tried to do so. Sullivan testified that on some occasions the defendant missed the tip of his nose. At that time, the officer placed the defendant under arrest for driving under the influence.

Police officer Sullivan testified that he had come in contact with individuals whom he believed to be under the influence of alcohol i excess of 100 times. After handcuffing the defendant, he placed him in the back of his squad car and transported him to the police department During an inventory search of the defendant's belongings, a small white folded paper was found in the defendant's wallet. The paper contained a white

powdery substance which, when tested, tested positively for the presence of cocaine. The officer the requested that the defendant take a breathalyzer test, and he witnessed the defendant take the test.

The test indicated that the defendant had a blood/alcohol concentration of .13.

On cross-examination, Officer Sullivan indicated that he made out an accident report at approximately 11:50 p.m. on January 2, 1986. He indicated that the defendant was in his driveway when the officer approached and he did not stop the defendant's car. It was approximately 1:10 a.m. on January 3, 1986, when he talked with the defendant. Officer Sullivan admitted that he did not cite the defendant for any traffic violations after he say him drive down the road. The officer further testified that the weather conditions were snowy and icy on the date in question. According to Sullivan, the defendant could touch his nose with his finger some of the time. However, in the officer's opinion, the defendant did not pass the test. Officer Sullivan further admitted that a

person' speech pattern might be hesitant or slow for reasons other than intoxication.

The next witness, Michael Kotarz, called the defendant, first testified that the defendant was not outside of his car when the officer approached him.

The trial court made specific findings that the arresting officer did not have reasonable grounds to believe that the driver was in full physical control of the motor vehicle as defined in the statute. He ordered the statutory summary

suspension of the defendant's driving privileges be rescinded. The trial court then set the felony charge for arraignment. The State filed a timely notice of appeal.

On March 26, 1986, the defendant filed a motion to suppress evidence in the prosecution for unlawful possession of a controlled substance. A hearing was held on May 2, 1986, and the defendant moved for suppression of the evidence and dismissal of the felony charged based upon the previous ruling of no reasonable cause to arrest the defendant for driving under the influence. The State concede that despite the trial court's ambiguous ruling to the contrary, the finding of no probable cause to arrest the defendant for the offense of driving under the influence would act as collateral estoppel and prevent the court from ruling anew on whether the search which resulted in finding the cocaine was made pursuant to a lawful arrest. The trial court agreed and ordered the defendant's motion to suppress be granted. The State filed a timely notice of appeal

from that order. The two appeals have been consolidated for purposes of our review.

On appeal, the State contends that the trial court's finding that the police officer did not have reasonable grounds to arrest the defendant for driving under the influence was against the manifest weight of the evidence. The State argues that the evidence indicates that the defendant was in actual physical control of the vehicle and that the evidence shows that Officer Sullivan engaged in some investigative communications the defendant, the result of which was sufficient to enable the officer to properly detain the defendant further.

After the defendant failed to perform the field sobriety tests adequately, the police

officer had probable cause to arrest the defendant.

Before turning to the merits of the appeal, we must review the State's motion to strike portions of defendant's statement of facts. We ordered the motion taken with the case. Supreme Court Rule 341(e)(6) (103 Ill.2d R. 341(e)(6)) provides that the statement of facts shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, with references to the pages of the record on appeal. We agree with the State that the defendant's statement of facts, replete with counsel's own remarks about what evidence was not produced, as well as comments regarding what evidence was conflicting, violated the supreme court rule. We will not consider those portions of the defendant's statement of facts which

violated Supreme Court Rule 341(e)(6) (103 Ill. 2d R. 341(e)(6). We turn now to the merits of the appeal.

The burden of proof in an implied consent hearing is placed on the State, and the standard to be met is the preponderance of evidence. (People v. Greenspon (1984), 129 Ill. App. 3d 849, 851, 473 N.E.2d 331, 333.) Whether the State has met its burden on an implied consent issue is a question of facts to be determined by the trial judge, and finding of the trier of fact in that regard will not be overturned on appeal unless such finding is palpable against the manifest weight of the evidence. A judicial finding of fact is not against the manifest weight of the evidence unless from the record an opposite

conclusion is clearly evident. People v.

Jacquith (1984), 129 Ill. App.3d 107, 117, 472 N.E.2d 107, 114.

The undisputed testimony of the arresting officer in this case was that he watched the defendant drive his vehicle to the residence where the officer was waiting to question the defendant about his involvement in an accident which had occurred earlier that day. The evidence also clearly indicated that Officer Sullivan engaged the defendant in a conversation for the purpose of investigating the reported accident. Where a police officer merely engages in a conversation with an individual, no restraint has been placed upon the individual's freedom to walk away from the officer, such an encounter does not constitute a stop even though the encounter was investigative in nature. People v. Kennedy (1978), 66 Ill.App. 3d 267, 273, 383 N.E.2d 713, 718-719.) The mere knowledge by the

person questioned that the person asking the questions is a police officer cannot in itself constitute a factor of threatened force because, were that so, every question put to a person under any circumstances by an identified police officer on duty would constitute a Terry stop, thereby calling into play the protections of the fourth amendment. There must be some element of force or of threatened force in order to constitute a stop. People v. Jordan (1976), 43 Ill. App.3d 660, 662-63, 357 N.E.2d 159, 162.

The Illinois Supreme Court has also considered whether questioning by a police officer must be held to constitute a stop. In People v. Long (1983), 99 Ill.2d 219, 229-30, 457 N.E.2d 1252, 1256, the court, citing Terry v. Ohio (1968), 392

U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868, stated that not all personal intercourse between a policeman and citizen involved a "Seizure" of the person. Only when the officer, by means of physical force or a show of authority, had in any way restricted the liberty of a citizen must the court conclude that a "Seizure" had occurred. Characterizing every street encounter between a citizen and a police officer as a "Seizure" would impose wholly unrealistic restraints upon a wide variety of legitimate law enforement practices. Citizens have a duty to cooperate with law enforcement practices. Citizens have a duty to cooperate with law enforcement officials who are investigating a crime.

We believe that the uncontradicted, credible testimony of Officer Sullian indicated that he did not stop

the defendant, but only asked him a few questions regarding the reported accident. At that point, after having noted that the defendant's speech was slurred, that the defendant exhibited difficulty in understanding to what the officer was referring, that the defendant was having problems keeping his balance, and that the defendant's breath smelled of alcohol, the officer had sufficient cause to detain the defendant further and request that he perform field sobreity tests. See People v. Saturday (1985), 135 Ill. App. 3d 1052, 1055 482 N.E.2d 1124, 1125-26.

According to Officer Sullivan, the defendant was unable to keep his balance while performing the balance test requested and was only able to touch his finger to his nose on a few occasions, we hold that at that point Officer Sullivan had probable cause to arrest the defendant for driving

under the influence of alcohol.

The defendant has argued that the assistant State's Attorney stipulated that the police officer did not have probable cause to arrest the defendant. We disagree. The record evidences that the assistant State's Attorney's remarks, taken in context, indicate that the prosecutor stipulated that when the police officer first approached the defendant to quesion him. he did not have probable cause to arrest the defendant for the offense of driving under the influence of alcohol. The prosecutor's remarks were part of an argument that the driving under the influence of alcohol prosecution did not arise out of the facts involving the accident which had occurred earlier in the day. Instead, that accident formed the basis for the police officer's purpose in

speaking with the defedant. It was the police officer's observation of the defendant as he drove up to his residence and as he spoke with the Officer Sullivan that formed the basis for the arrest.

Accordingly, we reverse the judgment of the trial court of DuPage County in which it ruled that the arresting officer did not have reasonable grounds to believe that the defendant was driving or in actual physical control of a motor vehicle while under the influence of alcohol. We also reverse the trial court's order in the prosecution for unlawful possession of a controlled substance that the evidence seized pursuant to the defendant's arrest must be suppressed as the result of an illegal arrest.

REVERSED.

INGLIS, NASH, JJ., and LINDBERG, P.J.